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## The Contribution of Brazil's 'Responsibility while Protecting' Proposal to the 'Responsibility to Protect' Doctrine

ALYSE PRAWDE<sup>†</sup>

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### INTRODUCTION

As a result of the ongoing civil war in Syria, more than 146,000 people have been killed<sup>1</sup> and at least six million people have fled their homes.<sup>2</sup> Over nine million people are in need of humanitarian assistance.<sup>3</sup> On August 21, 2013, the Syrian government is said to have used chemical weapons, killing an estimated 1,300 of its own civilians.<sup>4</sup> Over the course of the ongoing three-year civil war, the United Nations Security Council has only passed three minor resolutions and a February 2014 resolution calling for humanitarian aid access.<sup>5</sup> During the civil war, the Security Council has neither issued sanctions nor authorized military force to assist the people of

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1. Noah Rayman, *Report: More than 146,000 People Killed in Syrian Civil War*, TIME (Mar. 13, 2014), <http://time.com/24077/syria-death-toll/>.

2. UN Off. for the Coordination of Humanitarian Aff., Syria Crisis, <http://syria.unocha.org/> (last visited Apr. 5, 2014).

3. *Id.*

4. Press Release, White House Office of the Press Secretary, Government Assessment of the Syrian Government's Use of Chemical Weapons on Aug. 21, 2013 (Aug. 30, 2013) (on file with the author).

5. See S.C. Res. 2042, U.N. Doc. S/RES/2042, at 1-2 (Apr. 14, 2012) (authorizing UN advance team to monitor ceasefire in Syria); S.C. Res. 2043, U.N. Doc. S/RES/2043, at 1-2 (Apr. 21, 2012) (authorizing UN observer mission in Syria); S.C. Res. 2118, U.N. Doc. S/RES/2118, at 1-2 (Sept. 27, 2013) (requiring expeditious and verifiable destruction of Syria's chemical weapons); S.C. Res. 2139, U.N. Doc. S/RES/2139 (Feb. 22, 2014) (urging all member states to offer humanitarian aid to people affected by the crisis).

Syria. The Security Council's failure to take any significant action has led to strong criticisms of the Responsibility to Protect doctrine (commonly referred to as R2P),<sup>6</sup> an emerging international norm which asserts that if sovereign states cannot fulfill their responsibility to protect their citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity, the international community has the responsibility to protect those citizens by taking collective action.<sup>7</sup>

When R2P was first introduced and adopted by most of the international community nearly a decade ago, the still-developing norm was heralded for its potential to be recognized as a well-established international norm.<sup>8</sup> Today, while R2P's tenets are nearly universally accepted, the scope of its implementation remains highly contested, particularly the issue of whether to authorize military force to intervene in a state when prevention of mass atrocities has failed.<sup>9</sup> The first time the international community used R2P to authorize military force was NATO's intervention in Libya in 2011, acting on Security Council Resolution 1973.<sup>10</sup> While Western states and R2P's strongest proponents celebrated the quick and decisive action in Libya as a high-watermark for R2P,<sup>11</sup> numerous developing countries, most notably Brazil, Russia, India, China, and South Africa (the BRICS), criticized the intervention.<sup>12</sup> The BRICS believed

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6. *The Crisis in Syria*, INT'L COALITION FOR THE RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria> (last visited Nov. 13, 2013).

7. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

8. See U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Rep. of the High-Level Panel on Threats, Challenges, and Change*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004) (endorsing the norm).

9. Gareth Evans, *R2P Down but Not Out After Libya and Syria*, OPEN DEMOCRACY (Sept. 9, 2013), <http://www.opendemocracy.net/openglobalrights/gareth-evans/r2p-down-but-not-out-after-libya-and-syria>.

10. Herman Schaper, *Responsibility to Protect: An Emerging Principle*, INT'L COALITION FOR THE RESP. TO PROTECT (June 28, 2011), <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/3554-qresponsibility-to-protect-an-emerging-principle>.

11. See Ramesh Thakur, *Libya and the Responsibility to Protect: Between Opportunistic Humanitarianism and Value-Free Pragmatism*, 7 SECURITY CHALLENGES 13, 19 (Summer 2011), available at <http://www.securitychallenges.org.au/ArticlePDFs/vol7no4Thakur.pdf> ("In Libya, it took just one month to mobilise a broad coalition, secure a UN mandate to protect civilians, establish and enforce no-fly and no-drive zones, and stop Gaddafi's advancing army and prevent a massacre of the innocents in Benghazi.").

12. *Id.* at 21–22.

NATO overstepped the mandate by engaging in regime change.<sup>13</sup> As a result, in November 2011, Brazil introduced the concept of Responsibility while Protecting (RwP), which reaffirmed R2P's emphasis on prevention, and proposed criteria, such as last resort and balance of consequences, to be considered before the Security Council mandates the use of military force.<sup>14</sup> RwP also calls for a monitoring-and-review mechanism to provoke debate regarding the implementation of a resolution.<sup>15</sup>

This comment argues that to increase the potential success and fuller recognition of R2P as an international norm, R2P should embrace the core arguments set forth in RwP. Otherwise, non-Western countries will continue to be hesitant to get involved in human rights crises, as evidenced by the conflict in Syria. Part I of this article will examine the development of R2P, consider the important documents that have shaped the doctrine, and briefly analyze R2P's role in both Libya and Syria, as a way of understanding how RwP emerged as a concept.<sup>16</sup> Part II of this article will provide an overview of RwP, consider its key tenets, and compare RwP to R2P, arguing that RwP was not meant to be a competing norm, but should instead be embraced as a means of dialogue on improving R2P.<sup>17</sup> Part III will consider how the incorporation of RwP into R2P would beneficially shape the future of R2P as an international norm.<sup>18</sup>

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13. Oliver Stuenkel, *BRICS and the 'Responsibility While Protecting' Concept*, THE HINDU (Mar. 12, 2012), <http://www.thehindu.com/opinion/op-ed/article2985190.ece>.

14. *Id.* Last resort is the international precautionary principle that “[m]ilitary intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored.” Int’l Comm’n on Intervention and State Sovereignty [ICISS], *The Responsibility to Protect*, at xii (Dec. 2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. Balance of consequences means that the result of the intervention should cause less peril than that of inaction. Evans, *supra* note 9.

15. Stuenkel, *supra* note 13. Monitoring-and-review is a mechanism through which states in the Security Council “discuss and debate the implementation of any ongoing R2P action.” Stewart M. Patrick, *R2P on Life Support: Humanitarian Norms vs. Practical Realities in Syria*, COUNCIL ON FOREIGN REL. (June 12, 2013), <http://blogs.cfr.org/patrick/2013/06/12/r2p-on-life-support-humanitarian-norms-vs-practical-realities-in-syria/>.

16. *See infra* Part I.

17. *See infra* Part II.

18. *See infra* Part III.

## I. THE DEVELOPMENT OF R2P

### A. *Emergence of R2P at the International Commission on Intervention and State Sovereignty*

The R2P principle was introduced in the December 2001 report of the International Commission on Intervention and State Sovereignty (ICISS), an independent, Canadian-sponsored commission.<sup>19</sup> The catalyst of ICISS's report was NATO's intervention in Kosovo without Security Council authorization,<sup>20</sup> though the doctrine also arose out of the large-scale tragedies of the twentieth-century, namely the Holocaust, the killing fields of Cambodia, and the genocides in Rwanda and Srebrenica.<sup>21</sup> Additionally, ICISS was formed to answer the question put forth by then-Secretary General Kofi Annan: "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"<sup>22</sup> Secretary General Annan's question highlighted the tension between two leading principles of international law: The first is that states have the inherent right to sovereignty, which provides the ability to govern without international interference in domestic affairs, including the threat or use of military force against them, as stated in Articles 2(4) and 2(7) of the UN Charter.<sup>23</sup> The second requires states to protect their citizens' fundamental rights and freedoms, as declared as one of the purposes of the United Nations in its Charter.<sup>24</sup>

While humanitarian intervention is, at its core, focused on coercive military intervention for humanitarian purposes, R2P is first

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19. AIDAN HEHIR, *THE RESPONSIBILITY TO PROTECT* 1 (2012).

20. Anne Orford, *Lawful Authority and the Responsibility to Protect*, in *LEGALITY AND LEGITIMACY IN GLOBAL AFFAIRS* 248, 250 (Richard Falk, Mark Juergensmeyer & Vesselin Popovski eds., 2012).

21. *Timely and Decisive Response Vital to Uphold 'Responsibility to Protect'*, UN NEWS CENTRE (Sept. 5, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42806&Cr=responsibility+to+protect&Cr1=#.UNDDk1HA9UT>.

22. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century*, ¶ 217, U.N. Doc. A/54/2000 (Mar. 27, 2000).

23. Julia Hoffman & André Nollkaemper, *Introduction to RESPONSIBILITY TO PROTECT: FROM PRINCIPLE TO PRACTICE* 13, 13 (Julia Hoffmann & André Nollkaemper eds., 2012).

24. *Id.*

and foremost dedicated to prevention.<sup>25</sup> When the R2P concept was first introduced in 2001, its principles were not groundbreaking ideas, as they had grown out of the human rights, humanitarian, and human security movements of the previous decades.<sup>26</sup> French Minister Bernard Kouchner, for instance, advocated for the right to interfere in humanitarian crises during the 1980s.<sup>27</sup> However, what was groundbreaking was how R2P shifted the discussion away from its “cousin”—humanitarian intervention.<sup>28</sup>

The ICISS report put forth the notion that sovereign states have a responsibility to protect their citizens from avoidable catastrophes, such as murder and starvation, but when they are unwilling or unable to provide protection, the responsibility falls to the international community.<sup>29</sup> While the ICISS report addressed the rules and authority for the use of force, its focus was on the “advantages of prevention through encouraging States to meet their core protection responsibilities.”<sup>30</sup> The Commission also broadened the range of responses from those that are available under humanitarian intervention, which focuses solely on military reaction.<sup>31</sup> In sum, the ICISS report stated that there are three main elements to a response: first, short- and long-term *preventive* action—to avoid harm in the first place; second, *reaction*—to address the harm when preventive

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25. GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 56 (2008).

26. Ruan Zongze, *Responsible Protection*, CHINA DAILY (Mar. 15, 2012, 8:06 AM), [http://www.chinadaily.com.cn/cndy/2012-03/15/content\\_14837835.htm](http://www.chinadaily.com.cn/cndy/2012-03/15/content_14837835.htm).

27. EVANS, *supra* note 25, at 32–33.

28. Orford, *supra* note 20, at 248. Humanitarian intervention is the doctrine that there is a “‘right to intervene’ militarily in these cases, against the will of the government of the country in question.” EVANS, *supra* note 25, at 3.

29. *Int’l Comm’n on Intervention and State Sovereignty: Responsibility to Protect Report*, COUNCIL ON FOREIGN REL. (Dec. 2001), <http://www.cfr.org/humanitarian-intervention/international-commission-intervention-state-sovereignty-responsibility-protect-report/p24228>.

30. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 9, U.N. Doc. A/63/677 (Jan. 12, 2009).

31. Gareth Evans, Co-Chair, Global Ctr. for the Resp. to Protect, President Emeritus of the Int’l Crisis Group, former Foreign Minister of Austl., Cent. European Sch. of Pub. Policy, *Responding to Mass Atrocity Crimes: The Responsibility to Protect (R2P) After Libya and Syria* (Oct. 24, 2012) (transcript available at <http://www.gevans.org/speeches/speech496.html>).

action has failed; and third, post-crisis *rebuilding*—to prevent a recurrence of the harm at issue.<sup>32</sup>

*B. The 2005 World Summit Outcome Document*

R2P had an “almost unprecedented” acceptance by the international community, when more than 150 heads of state and government endorsed R2P’s key principles at the UN World Summit in 2005.<sup>33</sup> The World Summit Outcome Document (Outcome Document) of 2005 contained two paragraphs pertaining to R2P—Paragraphs 138 and 139—which limited the scope of protection to four types of crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>34</sup> Although Paragraphs 138 and 139 upheld the core R2P principles,<sup>35</sup> the Outcome Document deviated from the ICISS report, which referred to “large-scale loss of life,” one of two

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32. *Id.*

33. *Id.*

34. 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Sept. 16, 2005). Paragraphs 138 and 139 provide as follows:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

*Id.*

35. *Id.*

thresholds capable of activating R2P.<sup>36</sup> According to the Outcome Document, the international community, through the United Nations, has the responsibility to use diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VII of the UN Charter, to protect populations from the four listed mass atrocities.<sup>37</sup> The Security Council, in accordance with Chapter VII of the UN Charter, must be prepared to “take collective action, in a timely and decisive manner,” when peaceful means are inadequate, and should take such action on a case-by-case basis and in cooperation with the relevant regional organizations.<sup>38</sup>

According to Gareth Evans, who co-chaired ICISS, the Outcome Document’s language was positive in a number of respects.<sup>39</sup> First, the Outcome Document, more so than the ICISS report, placed greater emphasis on prevention and the responsibilities of states to assist other states in developing preventive capabilities.<sup>40</sup> Second, the Outcome Document focused strongly on reactive measures that fall short of military action.<sup>41</sup> Third, the central role of the United Nations, particularly the Security Council, in addressing military enforcement was consistent with earlier recommendations.<sup>42</sup> Evans notes that the “only disappointing omission from the Outcome Document is the failure to adopt any criteria for the use of military force, leaving the argument for such guidelines to be made another day.”<sup>43</sup> Unlike the ICISS document, the provisions outlining R2P in the Outcome Document neither reintroduced criteria for the use of force by the United Nations nor recognized the legality of armed humanitarian intervention beyond what the UN Charter previously

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36. ICISS, *supra* note 14, at xii. The second threshold capable of triggering R2P is “large scale ‘ethnic cleansing.’” *Id.*

37. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

38. *Id.*

39. EVANS, *supra* note 25, at 47–48.

40. *Id.* at 47.

41. *Id.* at 47–48.

42. *Id.* at 48.

43. *Id.*



stated.<sup>44</sup> These ambiguities regarding military force remain unresolved in debates about R2P.<sup>45</sup>

*C. R2P's General Acceptance at the United Nations and Adoption of its Modern Framework*

Overall, the principles of R2P have “been incorporated into United Nations operations in a way that humanitarian intervention never was.”<sup>46</sup> Secretary General Ban Ki-moon promised soon after his appointment in 2007 that he would “spare no effort to operationalize [R2P].”<sup>47</sup> The General Assembly and Security Council have reaffirmed R2P, and regional organizations, such as the European Union, have also embraced the concept with seemingly more willingness than was the case with humanitarian intervention.<sup>48</sup>

There was minimal application and discussion of R2P during the period from 2005 to 2009,<sup>49</sup> though the doctrine was referred to several times during this period. In Resolution 1674, the Security Council “reaffirmed” Paragraphs 138 and 139 of the Outcome Document in April 2006.<sup>50</sup> In Resolution 1706, the Security Council applied the R2P principle to a particular context for the first time when it called for the deployment of UN peacekeepers to Darfur in August 2006.<sup>51</sup> In 2008, ethnic-related violence erupted in Kenya following allegations that a national election was rigged, and over 1,000 people were killed and 300,000 people were displaced.<sup>52</sup> Secretary General Ban Ki-moon characterized the events in Kenya as an R2P situation, and Genocide Adviser Francis Deng called on Kenyan leaders to “meet their responsibility to protect the civilian

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44. CRISTINA GABRIELA BADESCU, HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT 7 (2011).

45. Gareth Evans, Co-Chair, Global Ctr. for the Resp. to Protect, Mass Atrocities and the Use of Force: R2P After Libya and Syria (Oct. 16, 2012) (transcript available at <http://www.gevans.org/speeches/speech492.html>).

46. Orford, *supra* note 20, at 252.

47. *Id.* at 252–53.

48. *Id.* at 253.

49. HEHIR, *supra* note 19, at 50. The international community did not use R2P to justify military intervention until 2011, when Security Council Resolution 1973 used R2P to authorize NATO intervention in Libya. Schaper, *supra* note 10.

50. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

51. Press Release, Security Council, Security Council Expands Mandate of UN Mission in Sudan to Include Darfur, Adopting Resolution 1706 by Vote of 12 in Favour, with 3 Abstaining, U.N. Press Release SC/8821 (Aug. 31, 2012).

52. EVANS, *supra* note 25, at 51.

population.”<sup>53</sup> Kofi Annan led a mediation team that negotiated a political settlement just a few weeks after the start of the violence.<sup>54</sup> The response was viewed by the United Nations as a success for R2P.<sup>55</sup>

Since the ICISS report, R2P has focused less on *what* its three-part structure of prevention, response, and rebuild entails, than on *how* to respond.<sup>56</sup> Secretary General Ban Ki-moon’s January 2009 Report on Implementing the Responsibility to Protect (2009 Report) gave R2P its now widely accepted terminological framework as three principles: (1) a state has a responsibility to protect its population from mass atrocities; (2) the international community has a responsibility to assist the state if it is unable to protect its population on its own; and (3) if the state fails to protect its citizens from mass atrocities and peaceful measures have failed, the international community has the responsibility to intervene through coercive measures such as economic sanctions, and military intervention is considered the last resort.<sup>57</sup> The 2009 Report, the first comprehensive document from the UN Secretariat on R2P, also noted that Paragraphs 138 and 139 of the Outcome Document are anchored in international law.<sup>58</sup> “Under conventional and customary international law, States have obligations to prevent and punish genocide, war crimes, and crimes against humanity,” and any action in Paragraphs 138 and 139 must be in conformity with the UN Charter.<sup>59</sup> The 2009 Report also called for the creation of a joint office for the UN Special Advisory on R2P and the UN Special Advisor on the Prevention of Genocide.<sup>60</sup>

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53. *Id.*

54. *Id.*

55. Evans, *supra* note 31. During this time there were also debates about how R2P should be applied in Darfur, the Congo, Sri Lanka, the response to the cyclone in Myanmar, and Russia’s invasion of South Ossetia. *Id.*

56. See Francis M. Deng, The Responsibility While Protecting: Talking Points for Remarks 2 (Feb. 21, 2012) (transcript available at <http://cpdoc.fgv.br/sites/default/files/2012%2002%2021%20Statement%20-%20Francis%20Deng.pdf>) (“Recent Security Council decisions . . . show that debates now focus on the manner of response in implementation of [R2P] rather than on the concept itself.”).

57. *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, *supra* note 30, ¶ 11.

58. *Id.* ¶ 3.

59. *Id.*

60. *Id.* ¶ 7.

In September 2009, the General Assembly adopted a resolution that brought R2P back to the forefront, as it “decide[d] to continue its consideration of the responsibility to protect.”<sup>61</sup> The General Assembly debates on R2P, which have occurred annually since 2009, have demonstrated a great degree of acceptance of R2P’s principles, with only a few voices challenging R2P’s foundation.<sup>62</sup> Additionally, the Security Council’s decisions in response to the conflicts in Cote d’Ivoire, Libya, and Syria illustrate that the focus of the debates shifted to *how* R2P should be implemented, rather than its underlying principles.<sup>63</sup>

More recently, the September 2012 informal dialogue of the General Assembly on the “Report of the Secretary-General on the Responsibility to Protect: Timely and Decisive Response” (Response Report) focused on R2P’s third principle.<sup>64</sup> The Response Report also recognizes that while the first and foremost goal is prevention, there may be times when “a timely and decisive response is required.”<sup>65</sup> Thus, the focus has shifted to how the tenets of Paragraph 139 are to be carried out, how their ambiguities should be resolved, and how those tenets should evolve moving forward.<sup>66</sup>

#### D. R2P and Sovereignty

One of the most controversial aspects of R2P originally was its interpretation of sovereignty.<sup>67</sup> International law protects and guarantees a state’s power over its citizens, which includes the right

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61. G.A. Res. 63/308, ¶ 2, U.N. Doc. A/RES/63/308 (Sept. 14, 2009).

62. Gareth Evans, Co-Chair, Global Ctr. for the Resp. to Protect, R2P and RWP After Libya and Syria (Aug. 23, 2012) (transcript available at <http://www.gevans.org/speeches/speech485.html>).

63. Deng, *supra* note 56, at 2.

64. Press Release, General Assembly, World Not Fulfilling ‘Never Again’ Vow, Secretary-General Tells General Assembly Meeting on Responsibility to Protect, U.N. Press Release GA/11270, at 3 (Sept. 5, 2012).

65. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response*, ¶ 3, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012).

66. *See id.* ¶¶ 14–18 (discussing the administration of R2P).

67. *See* Christoph Mikulaschek, *Report from the 39th International Institute Vienna Seminar on Peacemaking and Peacekeeping*, in THE UN SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT: POLICY, PROCESS, AND PRACTICE 23 (Jan. 15, 2010), <http://responsibilitytoprotect.org/mikulaschek.pdf> (discussing shifting consensuses regarding how sovereignty, under R2P, confers responsibilities upon states).

“to be free from external meddling or interference.”<sup>68</sup> Article 2(7) of the UN Charter prohibits the United Nations from intervening in matters that are essentially within the domestic jurisdiction of any state.<sup>69</sup> However, under R2P, the idea is that international law protects citizens when their governments fail grossly in their obligations.<sup>70</sup> While humanitarian intervention was seen as an unacceptable assault on sovereignty, advocates of R2P say its principles encourage state involvement in humanitarian relief by focusing on responsibility rather than the politically unattractive right of state intervention.<sup>71</sup>

Proponents of R2P view sovereignty as a privilege, rather than a right.<sup>72</sup> Thus, sovereignty does not exclusively protect states from foreign interference; instead, sovereignty is a state accountability tool that safeguards the welfare of people.<sup>73</sup> Such an idea is prevalent in Article 1 of the Genocide Convention.<sup>74</sup> Francis Deng, whose idea of sovereignty as responsibility was adopted in the ICISS report, argued that “sovereignty entailed enduring obligations towards one’s people, as well as certain international privileges.”<sup>75</sup> The United Nations has attempted to quiet fears that R2P is as an illegal intrusion into sovereignty, as seen in the 2009 Secretary-General’s report that stated “the responsibility to protect is an ally of sovereignty, not an adversary. It grows from the positive and affirmative notion of sovereignty as responsibility, rather than the narrower idea of

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68. See Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT’L L. 283, 284 (2004) (discussing different conceptions of sovereignty).

69. *Id.*

70. Anne-Marie Slaughter, *Intervention, Libya, and the Future of Sovereignty*, THE ATLANTIC (Sept. 4, 2011), <http://www.theatlantic.com/international/archive/2011/09/intervention-libya-and-the-future-of-sovereignty/244537/>.

71. José E. Alvarez, *The Schizophrenias of R2P*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 285, 285 (Phillip Alston & Euan Macdonald eds., 2008).

72. *The Responsibility to Protect*, OFFICE OF THE SPECIAL ADVISER ON THE PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Nov. 12, 2013).

73. *Id.*

74. *Id.*

75. See *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, *supra* note 30, ¶ 7 (discussing Deng’s idea of sovereignty as responsibility).

humanitarian intervention.”<sup>76</sup> Moreover, some scholars contend that history agrees with the United Nation’s interpretation of sovereignty.<sup>77</sup> Christopher Greenwood, a judge on the International Court of Justice, argued that “modern customary international law recognizes a right of military intervention on humanitarian grounds by states, or an organization like NATO.”<sup>78</sup>

*E. Libya and Syria: The High and Low Points of R2P*<sup>79</sup>

While some UN member states viewed the 2011 intervention in Libya as a defining moment of R2P and its future development, other states viewed the intervention as evidence that R2P may be utilized for regime change, thereby raising important questions about the powers and limitations of R2P.<sup>80</sup> The fear of these states is that R2P is “synonymous with regime change and loose resolution interpretations.”<sup>81</sup>

The intervention in Libya was the first and only occasion thus far where the “Security Council invoked [R2P] to authorize the use of force by UN member states”<sup>82</sup> for human protection objectives against the wishes of a functioning state.<sup>83</sup> In Resolution 1970, the

76. *Id.* ¶ 10(a).

77. See Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT’L L. 473, 480 (2012) (noting that, historically, humanitarian intervention has been regarded as a right).

78. Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT’L L. 141, 170 (1999). Greenwood traces such state practice to India’s humanitarian intervention in Bangladesh. *Id.* at 163.

79. This section assumes a basic understanding of the facts of the NATO intervention in Libya in 2011 and the ongoing civil war in Syria. For background on Libya, see *The Crisis in Libya*, INT’L COALITION FOR THE RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya> (last visited Nov. 12, 2013). For background on Syria, see *The Crisis in Syria*, INT’L COALITION FOR THE RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria> (last visited Nov. 12, 2013).

80. Hoffman & Nollkaemper, *supra* note 23, at 9.

81. Patrick Quinton-Brown, *Saving R2P from Syria*, CANADIAN INT’L COUNCIL (Aug. 14, 2012), <http://opencanada.org/features/the-think-tank/comments/saving-r2p-from-syria/>.

82. Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT’L L. 298, 298 (2012). Powell argues that the “transformation away from the traditional Westphalian notion of sovereignty has been unfolding for decades, but the Libyan case represents a further normative shift from sovereignty as a right to sovereignty as a responsibility.” *Id.*

83. Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d’Ivoire, Libya and the Responsibility to Protect*, 87 INT’L AFF. 825, 825 (2011).

Security Council “recalled the Libyan authorities’ responsibility to protect their population.”<sup>84</sup> Acting under Chapter VII and Article 41 of the UN Charter, the Security Council levied sanctions against Muammar Gaddafi, his family, and accomplices, and imposed an embargo on arms destined for Libya.<sup>85</sup> Resolution 1973 was the first time the Security Council authorized the use of force for human protection objectives against the wishes of a functioning state, finding that Libya had failed to uphold its responsibility to protect its population.<sup>86</sup>

The NATO intervention in Libya, according to Secretary Ban Ki-moon, showed that “[t]he Responsibility to Protect came of age; the principle was tested as never before.”<sup>87</sup> While the results may have been “uneven,” he argued that tens of thousands of lives were saved, thus showing that “human protection is a defining purpose of the United Nations in the twenty-first century.”<sup>88</sup> Evans views the NATO-invasion in Libya as a “textbook example of how R2P is supposed to work in the face of a rapidly unfolding mass atrocity situation during which early-stage prevention measures no longer have any relevance.”<sup>89</sup>

Though both the crises in Libya and Syria arose out of the Arab Spring,<sup>90</sup> the Security Council did not act swiftly in passing resolutions or authorizing military force in Syria as it did in Libya.<sup>91</sup> The delay in responding to the Syrian conflict—the Security Council did not formally condemn the violence until February 2012, even though uprisings began in March 2011—was not just because of the geopolitics of Syria or the hesitation of China and Russia, both of

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84. Schaper, *supra* note 10.

85. John F. Murphy, *Responsibility to Protect (R2P) Comes of Age? A Sceptic’s View*, 18 ILSA J. INT’L & COMP. L. 413, 428 (2012).

86. Schaper, *supra* note 10.

87. *Responsibility to Protect: Ban Urges Action to Make UN-Backed Tool ‘A Living Reality’*, UN NEWS CENTRE (Jan. 18, 2012), <http://www.un.org/apps/news/story.asp?NewsID=409722&#.UR1v5FF2tUQ>.

88. *Id.*

89. Evans, *supra* note 31.

90. Maya Bhardwaj, *Development of Conflict in Arab Spring Libya and Syria: From Revolution to Civil War*, 1 WASH. U. INT’L REV. 76, 77 (2012).

91. Mick B. Krever, *Why Won’t the U.N. Security Council Intervene in Syria?*, CNN (Jan. 13, 2012, 7:14 PM), <http://www.cnn.com/2012/01/13/world/meast/un-security-council-syria/index.html>.

which have political ties to the Syrian Government.<sup>92</sup> Instead, the BRICS group—Brazil, Russia, India, China and South Africa—who all sat on the Security Council in 2011, were the most critical of a potential intervention, particularly because of how the intervention in Libya occurred.<sup>93</sup> Many of the states that voted against or abstained from resolutions pertaining to Syria are the same states that “accuse the West of abusing the wording of Resolution 1973.”<sup>94</sup> They argue that the resolution was a mandate “to protect civilians and civilian populated areas under threat of attack,” not to bring about regime change.<sup>95</sup>

The BRICS were less critical of the initial military response of attacking Libyan air force infrastructure and ground forces.<sup>96</sup> Instead, their criticism pointed at what occurred after the initial attacks, when it became more apparent that the United States, United Kingdom, and France (known collectively as the P3) sought regime change.<sup>97</sup> Specifically, the BRICS asserted that the interveners rejected ceasefire offers that should have at least been considered; attacked fleeing personnel who posed no immediate harm to civilians; attacked locations without any military significance, such as the compound containing Gaddafi’s relatives; and supported the rebel side in what became a civil war.<sup>98</sup> The Security Council resolutions that authorized action in Libya “did not authorize outside powers to provide air support for subsequent rebelling against Gaddafi.”<sup>99</sup> The BRICS also argued that “non-coercive measures were not given sufficient time to demonstrate results in Libya.”<sup>100</sup> Despite the P3 response as to why such action was necessary, Council members were not given enough information at the time to sufficiently evaluate such actions.<sup>101</sup> Specifically, China and Russia were also critical of

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92. See *The Crisis in Syria*, INT’L COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-syria> (last visited Nov. 13, 2013) (discussing how both China and Russia vetoed resolutions to address the violence in Syria).

93. Evans, *supra* note 62.

94. Quinton-Brown, *supra* note 81.

95. Stuenkel, *supra* note 13.

96. Evans, *supra* note 62.

97. *Id.*

98. *Id.*

99. David Rieff, *R2P, R.I.P.*, N.Y. TIMES (Nov. 7, 2011), <http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html?pagewanted=all>.

100. *Responsibility to Protect: Timely and Decisive Response*, *supra* note 65, ¶ 54.

101. Evans, *supra* note 62.

the interpretation of the mandate in Libya, with Russia arguing that the bombing campaign sparked by the Revolution caused civilian casualties and such a use of force was not in strict compliance with the resolution.<sup>102</sup> Furthermore, South Africa later argued that the International Criminal Court should examine the actions taken in implementing Resolution 1973.<sup>103</sup>

While some diplomats and scholars, such as Ban Ki-moon and Evans, see Libya as a crowning success for R2P in action, others view the NATO intervention as the epitome of R2P's potential for military operationalization, which hurts R2P's normative credibility among those emerging powers that cautioned against the use of military force.<sup>104</sup> The BRICS thus view this as a warning against further similar incidents.<sup>105</sup> During the operation in Libya, BRICS diplomats were allegedly treated dismissively and kept uninformed, and such humiliation seems to be a proximate cause of the development of RWP.<sup>106</sup>

Given the Security Council's limited response in Syria, many scholars have come to view R2P as unsuccessful,<sup>107</sup> and therefore Syria shows the limitations of R2P.<sup>108</sup> From the start of the violence, the United Nations used R2P to describe the conflict, issuing a statement regarding Syria, reminding "the Government of Syria of its ongoing responsibility to protect its population."<sup>109</sup> The statement

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102. LUÍS PAULO BOGLIOLO PIANCASTELLI DE SIQUEIRA, *THE RESPONSIBILITY TO PROTECT AND THE RESPONSIBILITY WHILE PROTECTING: AN ANALYSIS OF HUMANITARIAN INTERVENTION AND THE DEVELOPING WORLD* 15–16 (Aug. 20, 2012), available at <http://ssrn.com/abstract=2201588>.

103. *Id.* at 16.

104. Rieff, *supra* note 99.

105. Thomas Wright, *Brazil Hosts Workshop on 'Responsibility While Protecting'*, FOREIGN POL'Y (Aug. 29, 2012, 11:29 AM), [http://bosco.foreignpolicy.com/posts/2012/08/29/brazil\\_backs\\_responsibility\\_while\\_protecting](http://bosco.foreignpolicy.com/posts/2012/08/29/brazil_backs_responsibility_while_protecting).

106. *Id.*

107. See Zack Beauchamp, *Syria's Crisis and the Future of R2P*, FOREIGN POL'Y (Mar. 16, 2012, 2:15 PM), [http://mideast.foreignpolicy.com/posts/2012/03/16/syrias\\_crisis\\_and\\_the\\_future\\_of\\_r2p](http://mideast.foreignpolicy.com/posts/2012/03/16/syrias_crisis_and_the_future_of_r2p) ("[S]keptics and defenders of invoking [R2P] can agree: Syria has put [R2P] . . . in crisis."). Beauchamp, however, argues that Syria should not be viewed as a failure for R2P. *Id.*

108. Williams et al., *supra* note 77, at 476.

109. Press Release, Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the situation in Syria (June 2, 2011).



also called for “an independent, thorough, and objective investigation into all alleged violations of international human rights law.”<sup>110</sup> In October 2011, the Security Council failed to adopt a resolution that would have: (1) condemned the human rights violations in Syria; (2) warned that action might be considered if warranted under the unfolding situation; and (3) demanded that Syrian authorities immediately ended the violence.<sup>111</sup> The resolution was vetoed by China and Russia; Brazil, India, Lebanon, and South Africa abstained.<sup>112</sup> China and Russia composed their own resolution which focused on respecting sovereignty and non-intervention, the unity of Syrians, and reaching peace through socio-economic reforms.<sup>113</sup> South Africa indicated it was “concerned by the imposition of punitive measures on Syria” fearing they were part of a hidden agenda for regime change.<sup>114</sup>

Syria is “an urgent test here and now” for the R2P doctrine, according to the Secretary-General.<sup>115</sup> The Security Council’s “paralysis does the Syrian people harm, damages its own credibility, and weakens a concept that was adopted with such hope and expectations.”<sup>116</sup>

Some diplomats have argued that in assessing how to assist the people in Syria, there are diplomatic, legal, and economic means that could be used to end the violence, serving as a middle ground between non-involvement and military intervention.<sup>117</sup> However, until non-Western countries, like the BRICS, no longer view R2P as a vehicle for regime change, finding such a middle ground remains unlikely. For instance, most recently, Russian President Vladimir Putin justified Russia’s invasion into Ukraine’s Crimean Peninsula by

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110. *Id.*

111. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria’s Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, U.N. Press Release SC/10403 (Oct. 4, 2011).

112. *Id.* Opponents of the resolution argued that the Council should focus on the dialogue between the parties rather than sanctions. *Id.*

113. *Id.*

114. *Id.*

115. *Timely and Decisive Response Vital to Uphold ‘Responsibility to Protect,’* UN NEWS CENTRE (Sept. 5, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42806&Cr=responsibility+to+protect&Cr1=#.UNDDk1HA9UT>.

116. *Id.*

117. Beauchamp, *supra* note 107.

invoking R2P.<sup>118</sup> Putin's invocation of R2P illustrates the fear that the BRICS have: the R2P doctrine is being used to mask military aggression as humanitarian intervention. Such an invocation of R2P demonstrates the necessity to further define—and create boundaries to—the R2P doctrine.

## II. RESPONSIBILITY WHILE PROTECTING

In September 2011, the government of Brazil proposed a new concept, Responsibility while Protecting (RwP), the first major reexamination of R2P since its conception.<sup>119</sup> RwP takes the view that the international community must demonstrate a high level of responsibility when it exercises its duty to protect citizens from mass atrocities.<sup>120</sup> The concept was introduced in September 2011 at the 66<sup>th</sup> General Assembly by Brazilian President Dilma Rousseff, which preceded the concept note presented to the UN Security Council on November 9, 2011.<sup>121</sup> RwP arose out of the perception by Brazil and other non-Western powers that R2P may be “misused for purposes other than protecting civilians, such as regime change.”<sup>122</sup> Therefore, in many ways, RwP is an attempt to answer some questions and address the ambiguities and problems of R2P.

Brazil's concept paper begins by emphasizing that all diplomatic solutions should be exhausted before military action is used.<sup>123</sup> Moreover, “a comprehensive and judicious analysis of the possible consequences of military action on a case-by-case basis” should be conducted before the use of force is employed.<sup>124</sup> The concept paper recognizes and cautions against the harm that has occurred from interventions, such as aggravating existing conflicts, permitting

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118. *Transcript: Putin Defends Russian Intervention in Ukraine*, WASH. POST (Mar. 4, 2014), [http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9cadcd1a-a3a9-11e3-a5fa-55f0c77bf39c\\_story.html](http://www.washingtonpost.com/world/transcript-putin-defends-russian-intervention-in-ukraine/2014/03/04/9cadcd1a-a3a9-11e3-a5fa-55f0c77bf39c_story.html).

119. *Responsibility While Protecting – The Impact of a New Initiative on RtoP*, INT'L COALITION FOR THE RESP. TO PROTECT (Sept. 14, 2012), <http://icrtopblog.org/feature/>.

120. Ambassador Maria Luiza Ribeiro Viotti, Letter dated Nov. 9, 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, ¶¶ 10–11, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

121. INT'L COALITION FOR THE RESP. TO PROTECT, *supra* note 119.

122. Viotti, *supra* note 120, ¶ 10.

123. *Id.* ¶ 7.

124. *Id.*

terrorism to spread to new places, giving rise to new violence, and increasing the vulnerability of civilians.<sup>125</sup> After providing the background supporting RwP, Brazil's concept paper provides a list of "fundamental principles, parameters and procedures," from which R2P and RwP can evolve together.<sup>126</sup> The first principle, in line with the UN Charter and as stated in the 2005 World Summit Outcome, is that prevention is always the best course of action, and all peaceful means should be exhausted in an effort to protect civilians threatened by violence.<sup>127</sup> Next, the use of force "must always be authorized by the Security Council, in accordance with Chapter VII of the UN Charter," or by the General Assembly, under extraordinary circumstances.<sup>128</sup> Such authorization of force must be limited, and the scope of military action should abide by the mandate given by the Security Council or General Assembly and be carried out in conformity with international law.<sup>129</sup> Furthermore, the use of force should generate as little violence and instability as possible and not succeed the harm it was authorized to prevent.<sup>130</sup> Lastly, the Security Council needs to improve procedures to monitor and assess how resolutions are interpreted and implemented to help ensure the accountability of those states to which the use of force is granted.<sup>131</sup>

In sum, RwP emphasizes prevention above all and calls for changes to the role of the Security Council in following an R2P mandate. Particularly, before any action is taken under the third pillar of R2P and under Chapter VII of the UN Charter, the Security Council must give "more formal and systematic attention" to prudential guidelines and criteria.<sup>132</sup> Once such action is taken, enhanced Council procedures should be employed to "monitor and assess the manner in which [the] mandates are . . . implemented."<sup>133</sup>

Despite the attention RwP received upon its presentation in late 2011,<sup>134</sup> neither Brazil nor the United Nations have formally

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125. *Id.* ¶ 9.

126. *Id.* ¶ 11.

127. Viotti, *supra* note 120, ¶ 11(a)–(b).

128. *Id.* ¶ 11(c).

129. *Id.* ¶ 11(d).

130. *Id.* ¶ 11(e).

131. *Id.* ¶ 11(h)–(i).

132. Evans, *supra* note 62.

133. *Id.*

134. When Rousseff gave her opening address to the General Assembly, the room was packed and "[i]n the months after RwP's launch, it was impossible to speak about humanitarian intervention without mentioning [Foreign Minister]

advanced shaping or developing this doctrine.<sup>135</sup> Most significantly, on February 21, 2012, the Brazilian Permanent Mission held an informal discussion with Member States, UN actors, and civil society organizations to discuss RwP.<sup>136</sup> Minister Antonio de Aguiar Patriota stated that the United Nations has an obligation to develop an awareness of the dangers involved when force is used and to create mechanisms that provide a detailed assessment of these dangers and ways to protect citizens.<sup>137</sup> Most recently, there was discussion of RwP during the annual dialogue of R2P in September 2012.<sup>138</sup> Although several delegates expressed their support for RwP, there was no formal discussion of RwP nor was RwP the central theme.

*A. Norm competition? RwP versus R2P*

One of the earliest concerns about RwP was that it was not clear whether it was an attempt to challenge and detract from the decade of development of R2P as an emerging norm or a means to foster dialogue about R2P.<sup>139</sup> However, Ambassador Ribeiro's speech makes clear that RwP was not an attempt to challenge R2P, but rather a contribution to the conceptual framework of R2P that was already in place.<sup>140</sup> Moreover, in its concept paper, Brazil indicated it was not attempting to challenge R2P, but was merely attempting to clarify

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Patriota's proposal." Oliver Stuenkel, *Brazil's Enigmatic Retreat: The Case of the Responsibility While Protecting (RwP)*, POST-WESTERN WORLD (Aug. 1, 2013), <http://www.postwesternworld.com/2013/08/01/brazils-enigmatic-retreat-the-case-of-the-responsibility-while-protecting-rwp/>.

135. See *id.* (arguing that Brazil no longer "prioritizes [RwP] matter[s]" and that others in the Security Council have not yet decided to lead on this issue). "While RwP continues to be mentioned during debates, there is no longer the sense that Brazil prioritizes the matter. It has refrained from issuing an official follow-up note to deal with some of the most convincing critics." *Id.*

136. INT'L COALITION FOR THE RESP. TO PROTECT, *supra* note 119.

137. Minister Antonio de Aguiar Patriota, Debate on "Responsibility While Protecting" at the United Nations (Feb. 21, 2012) (transcript available at <http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/pronunciamento-do-ministro-das-relacoes-exteriores-antonio-de-aguiar-patriota-em-debate-sobre-responsabilidade-ao-proteger-na-onu-2013-nova-york-21-de-fevereiro-de-2012>).

138. Press Release, General Assembly, World Not Fulfilling 'Never Again' Vow, Secretary-General Tells General Assembly Meeting on Responsibility to Protect, U.N. Press Release GA/11270 (Sept. 5, 2012).

139. INT'L COALITION FOR THE RESP. TO PROTECT, *supra* note 119.

140. Andreas S. Kolb, *The Responsibility to Protect (R2P) and the Responsibility while Protecting (RwP): Friends or Foes?* 2012 GLOBAL GOVERNANCE INST. 9.

it.<sup>141</sup> RwP was intended, instead, to become “a component of R2P’s third-pillar vocabulary,” rather than developing into a separate norm itself.<sup>142</sup> While the fear does exist that a new concept like RwP may detract from R2P,<sup>143</sup> the greater consensus has been that RwP, if understood as providing suggestions for implementing R2P, will “sharpen the debate” of how to best respond to situations that warrant the invocation of R2P.<sup>144</sup>

While Brazil may not have intended its RwP doctrine to compete with the R2P doctrine, there are differences between the doctrines that raise important questions. RwP requires full exhaustion of non-coercive means before more robust action is taken, whereas Secretary General Ban Ki-moon’s R2P focuses on “early and flexible responses.”<sup>145</sup> RwP also proposes adopting military intervention guidelines that were not unanimously endorsed by Member States in the World Summit Outcome Document.<sup>146</sup>

#### *B. Member States Respond to RwP*

RwP did not receive overwhelming support upon introduction, though there has been a generally positive response to the proposal over the last couple of years.<sup>147</sup> Western states have overall been less supportive of RwP than non-Western states, like the BRICS, who are more wary of intervention. The Netherlands noted that over-planning may delay action and allow the atrocities to escalate.<sup>148</sup> The German Ambassador raised his own concerns, noting that RwP limits the

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141. *Id.*

142. Quinton-Brown, *supra* note 81.

143. Wright, *supra* note 105 (arguing that RwP would: (1) undermine, rather than strengthen R2P; (2) lead to a good deal of opposition in the West; (3) lead to greater harm to civilians because it incentivizes behavior by the adversary; and (4) be unable to provide solutions to R2P’s issues or offer any other alternatives).

144. Deng, *supra* note 56.

145. *Prevention Newsletter*, U.S. INST. OF PEACE, Jan. 2012, at 5, available at [http://www.usip.org/files/resources/Prevention\\_2012\\_Newsletter.PDF](http://www.usip.org/files/resources/Prevention_2012_Newsletter.PDF).

146. INT’L COALITION FOR THE RESP. TO PROTECT, *supra* note 119; see generally Viotti, *supra* note 120, ¶ 11(a)–(b) (discussing military intervention guidelines).

147. Evans, *supra* note 31.

148. Ambassador Herman Schaper, Permanent Representative, Permanent Mission of the Kingdom of the Netherlands to the United Nations, Informal Debate on Brazilian Concept Note on “Responsibility While Protecting” (Feb. 21, 2012) (transcript available at <http://cpdoc.fgv.br/sites/default/files/2012%2002%2021%20Statement%20-%20Netherlands.pdf>).

ability to take timely and decisive actions in important situations.<sup>149</sup> The Ambassador publicly stated that RwP limits the scope for timely solutions because of “its prescription of a strict chronological sequencing, the mandatory exhaustion of all peaceful means, and the introduction of ‘exceptional circumstances’ as an additional qualifying trigger.”<sup>150</sup>

Some American diplomats see RwP as “anti-American banter,” while others believe that with some edits it could help to create a new standard.<sup>151</sup> The United States was critical of the “higher thresholds for the legitimacy of military intervention, such as the requirement that [R2P’s] three pillars follow a strict line of political subordination and chronological sequencing.”<sup>152</sup> The United States agrees with RwP’s notion that “‘prevention is always the best policy’ and [that] preventative diplomacy needs to be strengthened.”<sup>153</sup> However, the United States has highlighted two of the elements of RwP with which it disagrees. First, the United States argues that it is a mistake to “equate ‘manifest failure’ with strict chronological sequence.”<sup>154</sup> There should instead be a “comprehensive assessment of risks and costs and the balance of consequences” when making decisions, rather than just “‘temporal’ considerations.”<sup>155</sup> Second, the United States disagrees with the idea that in “circumstances where collective action is necessary, diplomacy should be considered ‘exhausted.’”<sup>156</sup> Conversely, both China and India have “welcomed” RwP,<sup>157</sup> and

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149. Ambassador Dr. Peter Wittig, Permanent Representative of Ger. to the United Nations, Informal Discussion on “Responsibility While Protecting” (Feb. 21, 2012) (transcript available at <http://www.responsibilitytoprotect.org/Informal%20discussion%20on.pdf>).

150. *Id.*

151. Matias Spektor, *The Arab Spring, Seen from Brazil*, N.Y. TIMES (Dec. 23, 2011, 2:55 AM), <http://latitude.blogs.nytimes.com/2011/12/23/the-arab-spring-seen-from-brazil/>. All diplomats with whom the author spoke thought the Libya intervention should be seen “as a model for the future [as it was] a show of force that was quick and decisive and properly approved by the U.N.” *Id.*

152. Paulo, *supra* note 102, at 19.

153. U.S. Mission to the United Nations, Remarks by the United States at an Informal Discussion on “Responsibility while Protecting” (Feb. 21, 2012) (transcript available at <http://usun.state.gov/briefing/statements/184487.htm>).

154. *Id.*

155. *Id.*

156. *Id.*

157. Quinton-Brown, *supra* note 81. H.S. Puri of India stated:

Russia is committed to “participat[ing] constructively in developing [the] idea” of RwP.<sup>158</sup>

The only organized UN dialogue on RwP thus far was an informal discussion coordinated by the Permanent Mission of Brazil on RwP on February 21, 2012.<sup>159</sup> The consensus was that RwP was welcomed as a means of enhancing R2P's implementation, but R2P's framework, as set out in the World Summit Outcome Document, was not to be renegotiated.<sup>160</sup>

### III. MOVING FORWARD: RWP'S CONTRIBUTION TO R2P

RwP raises important considerations for the future of R2P and should be embraced as a dialogue regarding R2P, not as a competing norm. Gareth Evans, for instance, believes that the RwP proposal, with further development, can play a critical role in advancing R2P as an accepted international norm.<sup>161</sup> R2P has the potential to become a norm of international law, but after Libya and Syria, the doctrine of R2P is unlikely to take this step without incorporating some elements from RwP.<sup>162</sup> The growing perception that R2P is at its core about

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“[I]n the implementation of the Council's mandate for protecting civilians, there is the need to ensure the responsibility while protecting. The recent actions of some organizations and member-states have brought to the fore a considerable sense of unease about the manner in which the humanitarian imperative of protecting civilians has been interpreted for actual action on the ground. Monitoring of the manner in which the Council's mandates are implemented has, therefore, assumed great significance and importance.”

H.S. Puri, Permanent Representative at the Security Council, Open Debate on “Protection of Civilians in Armed Conflict” ¶ 11 (June 25, 2012) (transcript available at <http://www.un.int/india/2012/ind2040.pdf>).

158. Quinton-Brown, *supra* note 81.

159. *United Nations Informal Discussion on “Responsibility While Protecting”*, INT'L COALITION FOR THE RESP. TO PROTECT (Feb. 21, 2012), <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4002-informal-discussion-on-brazils-concept-of-responsibility-while-protecting>. Brazil's Minister of External Relations Ambassador Antonio de Aguiar Patriota and UN Special Adviser for the Responsibility to Protect Dr. Edward Luck co-chaired the discussion. *Id.* The following gave remarks: (1) twenty-two Member States; (2) the European Union, (3) Special Adviser on the Prevention of Genocide Francis Deng; and (4) several civil society organizations (the Global Centre for the Responsibility to Protect, Campaign for Innocent Victims in Conflict, and Human Rights Watch). *Id.*

160. *Id.*

161. Evans, *supra* note 62.

162. *Id.*

regime change makes it more challenging for the international community to achieve its protection objectives.<sup>163</sup> While RwP is unlikely to put an end to Security Council deadlock, it can address some of the rhetoric hindering R2P's normative development: "[i]f dissenters no longer fear R2P's ambiguities of implementation, they can more confidently employ R2P language in UN debates and approve related resolutions."<sup>164</sup> The BRICS felt bruised by P3's dismissiveness during the Libya campaign, and these "bruises will have to heal before any consensus can be expected on tough responses to such situations in the future."<sup>165</sup>

The most notable elements of RwP that should be incorporated into R2P are the strengthening of prevention and the need for accountability and assessment in the Security Council.<sup>166</sup> Above all, RwP seeks a renewed focus on prevention.<sup>167</sup> While rhetoric does exist already in the R2P doctrine on prevention, there is a demonstrated need for firm strategies.<sup>168</sup> Scholar Alex Bellamy suggests three elements of prevention: first, improvements in capacity building, specifically examining what the United Nations does to assist with the prevention of mass atrocities and how capacities can be strengthened to fill in the current gaps; second, a need to strengthen the United Nation's early warning and early assessment capabilities, leading to an additional need for resources besides those currently provided to the Joint Office to improve analytical capacity; and third, a focus on prevention of genocide and mass atrocities, which needs to be "mainstreamed into the work of the whole UN system."<sup>169</sup>

The need for greater accountability and assessment in the Security Council is based on the BRICS' allegations that the P3 expanded the mandate in Libya to regime change, and the BRICS request better procedures in how the Security Council holds states

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163. Viotti, *supra* note 120, ¶ 10.

164. Quinton-Brown, *supra* note 81.

165. Evans, *supra* note 62.

166. Alex Bellamy, *R2P—Dead or Alive?*, in *THE RESPONSIBILITY TO PROTECT—FROM EVASIVE TO RELUCTANT ACTION? THE ROLE OF GLOBAL MIDDLE POWERS* 11, 22–23, 25 (Malte Brosig ed., 2012), available at <http://www.issafrica.org/uploads/FromEvasiveReluctantAction.pdf>.

167. *Id.* at 22.

168. *Id.*

169. *Id.* at 23.



accountable that act on its mandates.<sup>170</sup> Bellamy criticizes the BRICS' procedural requests, arguing that such changes would result in a change to the UN Charter and would make it more difficult for the Security Council to reach a consensus in a timely manner.<sup>171</sup> However, measures that could be taken to strengthen accountability include having the Security Council write "accountability measures into its resolutions" based on the particular issue, which parallels RwP's focus on stronger analysis in making decisions.<sup>172</sup> Bellamy suggests that the UN Secretariat should be tasked with assessing the best responses to situations and providing briefings to the Security Council on emerging solutions and possible options.<sup>173</sup>

Additionally, the Security Council should adopt a set of criteria, including an enhanced monitoring and review process that will encourage debate among Security Council members and ensure the proper implementation of mandates that call for the use of military force.<sup>174</sup> Regarding criteria, Evans suggests that the unimplemented recommendations of the ICISS Commission and the reports that followed listed five specific prudential guidelines that the Security Council should consider before authorizing any coercive military action under Chapter VII of the Charter, instead of only in R2P situations.<sup>175</sup> Evans recognizes the criticism of such guidelines may be that "'rigid criteria' [are] impossible to apply" in real world situations; his response is that these critiques "overstate the case, and

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170. *Id.*

171. *Id.* at 24.

172. *Id.*

173. *Id.* at 25.

174. Evans, *supra* note 62.

175. *Id.* The five specific guidelines are:

First, seriousness of risk: is the harm occurring or being threatened of such a kind and scale as to justify *prima facie* the use of force? Second, primary purpose: is the use of force primarily intended to halt or avert the threat in question, whatever secondary motives might be in play for different states? Third, last resort: has every non-military option been fully explored and the judgment reasonably made that nothing less than military force could halt or avert the harm in question? Fourth, proportionality: are the scale, duration, and intensity of the proposed military action the minimum necessary to meet the threat? And fifth, balance of consequences: will those at risk ultimately be better or worse off, and the scale of suffering greater or less? Will more good than harm be done?

*Id.*

sometimes simply conceal a preference for behaving in a completely ad hoc fashion.”<sup>176</sup>

Regarding process, explicit R2P mandates like Resolution 1973 leave the responsibility to implement the mandate to the large, powerful states that are unlikely to welcome close scrutiny of their operations.<sup>177</sup> However, such states should have an obligation to regularly check back with the Security Council to provide an update on how the mandate is being interpreted and the progress of the operation, thereby permitting debate on how the mandate is being carried out.<sup>178</sup> These reports would be less about holding states legally accountable, but more about recognizing that destructive skepticism about interventions will grow “unless the courts of rationality, public opinion and peer group understanding can be broadly satisfied.”<sup>179</sup>

Ultimately, with a renewed focus on prevention, there needs to be compromise among states. Western states that may favor intervention should “provid[e] real resources to strengthening preventive capacities.”<sup>180</sup> States that are skeptical of intervention should be more willing to act earlier to deal with an imminent crisis and allow for an earlier response from the international community.<sup>181</sup>

While the government of Brazil was in the best position to continue the dialogue about RwP, as it originally presented the concept and it co-led an informal dialogue on RwP in early 2012, it has failed to update the concept note or further advance RwP.<sup>182</sup> Other nations, particularly developing powers, should work to gain support for RwP and its development, given that “R2P only prospered because of a small group’s tireless efforts to promote the topic.”<sup>183</sup>

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176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Bellamy, *supra* note 166, at 22.

181. *Id.*

182. Wright, *supra* note 105.

183. Stuenkel, *supra* note 134 (“In the same way, RwP is unlikely to have a lasting impact on the debate without a powerful and credible sponsor like Brazil.”).

## CONCLUSION

For R2P to become a universally accepted international norm, Western states should consider what elements of RwP could be incorporated into their understanding of R2P. While it is premature for scholars to declare “R2P, R.I.P.,”<sup>184</sup> the deadlock in the Security Council over what action to take in Syria has allowed the Syrian Government to continue committing crimes against humanity.<sup>185</sup> While R2P's framework may be nearly universally accepted, operationalizing the concept is not, as demonstrated in Syria. This is due in large part to hesitation by non-Western states fearful of intervening, particularly after NATO's intervention in Libya. If non-Western states have contributed to and accepted R2P, it is less likely that there will be future delays like the one in Syria. RwP suggests that implementing R2P does not necessarily need to look like the Libyan campaign in the future, and instead a compromise can be reached that focuses on prevention, and pre-intervention guidelines and criteria that are flexible enough to secure the agreement of Western states. The world must not return to the days of the Holocaust, Rwanda, or Srebrenica where governments commit mass atrocities against their own citizens. R2P provides promise as an international norm capable of preventing the reoccurrence of such human rights abuses, but in order to get support from the international community at large, the doctrine of R2P should incorporate RwP principles.

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184. Rieff, *supra* note 99.

185. Howard LaFranchi, *Deadlock on Syria: Likely Crimes Against Humanity, But No Plan of Action*, CHRISTIAN SCI. MONITOR (Feb. 13, 2012), [www.csmonitor.com/USA/Foreign-Policy/2012/0213/Deadlock-on-Syria-Likely-crimes-against-humanity-but-no-plan-of-action/](http://www.csmonitor.com/USA/Foreign-Policy/2012/0213/Deadlock-on-Syria-Likely-crimes-against-humanity-but-no-plan-of-action/).